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Before the  
Federal Communications Commission

AUG 14 1997

Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b)  
Table of Allotments  
FM Broadcast Stations  
(Rosendale, New York)

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MM Docket No. 93-17  
RM-8170

To: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

**OPPOSITION TO**  
**PETITION FOR RECONSIDERATION**

Aritaur Communications, Inc. ("Aritaur")<sup>1</sup>, by and through counsel, hereby respectfully submits its Opposition to the above-captioned Petition for Reconsideration (the "Petition") filed by State University of New York ("SUNY"), on August 1, 1997, that seeks modification of certain aspects of the Commission's Memorandum Opinion and Order, *Rosendale, New York*, FCC 97-226, released July 2, 1997 (herein "*Order Denying Review*").<sup>2</sup> In opposition thereto, it is stated as follows:

**Background**

SUNY, licensee of noncommercial station WFNP(FM) operating on reserved Channel \*204A at Rosendale, filed a petition for rule making that resulted in the issuance of a Notice of Proposed Rule Making, *Rosendale, New York*, 8 FCC Rcd 947 (1993) that proposed the

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<sup>1</sup> Counsel for Rosendale applicant Eric P. Straus has indicated Straus' concurrence with the position taken herein by Aritaur.

<sup>2</sup>Thus, pursuant to 47 C.F.R. § 1.106(g) and 1.429(f), Aritaur's opposition is timely filed.

allotment of Channel 273A to Rosendale and the modification of the license of WFNP to operate on Channel 273A. SUNY did not request that Channel 273A be reserved for noncommercial educational use, so the FCC properly noted that should another party express interest in providing service to Rosendale on Channel 273A, the channel would be available for allotment. In response to the Notice, SUNY specifically stated that it did not want Channel 273A reserved for noncommercial use even though it would continue to operate WFNP as a noncommercial station.

The Report and Order, *Rosendale, New York* (“*Allotment Order*”), 10 FCC Rcd 11471 (1995) did not modify the license of WFNP to operate on Channel 273A, but instead allotted the channel for commercial or noncommercial (non-reserved) use, and opened a filing window. Ten applications (including Aritaur’s) were filed during the filing window seeking a construction permit for Channel 273A at Rosendale.

SUNY filed a petition for reconsideration of the *Allotment Order*. The Commission’s Memorandum Opinion and Order, *Rosendale, New York* (“*Reconsideration Order*”), 11 FCC Rcd 3607 (1996) denied SUNY’s petition for reconsideration. SUNY filed an Application for Review of that denial. In the *Order Denying Review*, complained of here, SUNY’s Application for Review was denied. Now, SUNY is back with its second petition for reconsideration of the denial of the *Order Denying Review*. SUNY’s latest petition should, like its prior pleadings, be denied or dismissed as repetitive or procedurally defective.

### **The Commission Should Deny SUNY’s Latest Petition**

There comes a time when orderly process requires that an applicant may not sit back and hope that a decision will be in its favor, and when it is not, parry with an offer of new evidence.

*Idaho Broadcasting Consortium, Inc.*, 11 FCC Rcd 5264 (1996). It is respectfully submitted that the Commission, in order to foster the goal of orderly process, should look with disfavor on a Petition for Reconsideration of the denial of an Application for Review, and it should be denied.

SUNY has not proceeded correctly in filing this latest petition. Section 1.106(a)(1) of the Rules specifically recites that it does not govern “reconsideration of Commission action in notice and comment rule making proceedings. See §1.429. This §1.106 does not govern reconsideration of such actions.” Thus, any reconsideration must be brought under the provisions of Section 1.429. That Section provides that a petition for reconsideration that relies on new facts which have not previously been presented to the Commission will be granted only if (1) the facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; (2) the facts relied upon were unknown to petitioner until after his last opportunity to present them, and he could not have learned them through ordinary diligence, or (3) the Commission determines that consideration of the facts relied on is in the public interest. SUNY states that its pleading is “consistent with Section 1.106 of the Rules,” and never mentions the prerequisite to review in Section 1.429. Further, SUNY has addressed its petition to the Chief, Allocations Branch, who cannot reconsider an action by the full commission. (See Section 1.429(a)). As such, its petition must be denied as procedurally defective.

The Commission, in its *Order Denying Review* succinctly set out the reasons why SUNY’s cause is devoid of merit. There is no need to rehash those arguments, except to state that the Commission has made no error in its previous orders in this docket.

If the Commission summarily denies SUNY's latest petition, nothing else need be discussed. However, there is one aspect of SUNY's Petition for Reconsideration, which has been raised for the first time, that requires comment. SUNY's Petition at p. 5 submits that there is an alternative channel (Channel 255A) which is available at Rosendale. SUNY suggests that it would be in the public interest for all of the present applicants for Channel 273A, except SUNY, to go through the time and expense of modifying their applications to specify Channel 255A, rather than Channel 273A, so SUNY's application for Channel 273A can be granted.

SUNY provides no reason why it would not be more in the public interest, were the Commission to consider the allotment of Channel 255A to Rosendale, to have one applicant, *i.e.*, SUNY, modify its application, rather than force Aritaur and the other eight applicants to go through the time and expense of modifying their applications, not only to change frequencies, but, in some instances, to perhaps change transmitter sites.

Thus, while Aritaur has no objection to the Commission initiating a rule making proceeding to assign Channel \*255A to Rosendale as an educational channel and the ultimate modification of SUNY's license to operate station WFNP to specify Channel \*255A, Aritaur does object to SUNY's suggestion that Aritaur be obligated to amend its application to specify Channel 255A rather than Channel 273A. However, in light of the extraordinary nature of SUNY's proposal to obtain the right to use Channel \*255A without facing any competition, a precondition to the modification of the license of WFNP to operate on Channel \*255A should be the dismissal with prejudice of SUNY's application for Channel 273A at Rosendale. That would reduce the number of applicants at Rosendale from ten to nine, and would increase program diversity in the Rosendale area, since a newcomer would become the eventual occupant of

Channel 273A. SUNY is already the licensee of WFNP, serving Rosendale, and there is no public interest reason to give SUNY yet another channel when there are nine other parties who have expressed interest in operating a new station at Rosendale.

IN LIGHT OF THE FOREGOING, Aritaur respectfully requests the Commission to deny SUNY's latest Petition for Reconsideration, or, in the alternative to take the action suggested.

Respectfully submitted,

**ARITAUR COMMUNICATIONS, INC.**

A handwritten signature in black ink, appearing to read 'Gary S. Smithwick', written over a horizontal line.

By: \_\_\_\_\_

Gary S. Smithwick  
Robert W. Healy  
Its Attorneys

**SMITHWICK & BELENDIUK, P.C.**

1990 M Street, N.W.  
Suite 510  
Washington, D.C. 20036  
(202) 785-2800

August 14, 1997

## **CERTIFICATE OF SERVICE**

I, Angela Y. Powell, a secretary in the law offices of Smithwick & Belendiuk, P.C., hereby certify that copies of the foregoing Comments Regarding Petition for Reconsideration were delivered by first-class mail, postage prepaid, mailed this the 14th day of August, 1997 to the following:

Mr. John A. Karousos\*  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau  
Federal Communications Commission  
2000 M Street, N.W.  
Room 554  
Washington, D.C. 20554

Ms. Leslie Shapiro\*  
Allocations Branch  
Federal Communications Commission  
2000 M Street, N.W.  
Room 564  
Washington, D.C. 20554

Mark N. Lipp, Esq.  
Ginsburg, Feldman & Bress, Chartered  
1250 Connecticut Ave., N.W.  
Suite 800  
Washington, D.C. 20036-2603  
**Counsel for Sacred Heart University, Inc.**

Todd D. Gray, Esq.  
Dow, Lohnes & Albertson, PLLC  
1200 New Hampshire Ave., N.W.  
Suite 800  
Washington, D.C. 20035-6802  
**Counsel for State University of New York**

C. Shaffer, Esq.  
Schwartz, Woods & Miller  
1350 Connecticut Ave., N.W.  
Suite 300  
Washington, D.C. 20036  
**Counsel for WMHT Educational  
Telecommunications**

Allan G. Moskowitz, Esq.  
Kaye, Scholer, Fierman, Hays & Handler  
901 15th Street, N.W.  
Washington, D.C. 20005  
**Counsel for Span Communications Corp.**

A. Wray Fitch III, Esq.  
Gammon & Grange, P.C.  
8280 Greensboro Dr.  
Seventh Floor  
McLean, VA 22102-3807  
**Counsel for Raymond A. Natole**

Mr. Dennis Jackson  
Radio South Burlington, Inc.  
Radio Station WQQQ(FM)  
19 Boas Lane  
Wilton, CT 06897

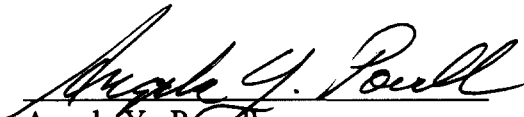
Lauren A. Colby, Esq.  
P.O. Box 113  
Frederick, MD 21705  
**Counsel for Eric P. Straus**

Erwin G. Krasnow, Esq.  
Verner, Liipfert, Bernard, McPherson &  
Hand  
901 15th Street, N.W.  
Washington, D.C. 20005  
**Counsel for David M Fleisher & Steven  
Melissa M. Krantz**

Jerold L. Jacobs, Esq.  
Rosenman & Colin, L.L.P.  
1300 19th Street, N.W.  
Washington, D.C. 20036  
**Counsel for  
Hawkeye Communications, Inc.**

Gregory L. Masters, Esq.  
Fisher, Wayland, Cooper, Leader & Zaragoza  
2001 Pennsylvania Ave., N.W.  
Suite 400  
Washington, D.C. 20006  
**Counsel for Rosen Broadcasting, Inc.**

Barry A. Friedman, Esq.  
Thompson, Hine & Flory  
1920 N Street, N.W.  
Washington, D.C. 20036  
**Counsel for Marist College**

  
Angela Y. Powell

**\*By Hand Delivery**